IN THE HIGH COURT OF THE UNITED REPUBLIC OF TANZANIA
(COMMERCIAL DIVISION)
AT DAR ES SALAAM

Misc. Commercial Appl. No. 68 of 2022
(Arising from Commercial Case No.126 of 2021)

LUCY THOMAS KIMARO.....APPLICANT

VERSUS

STANBIC BANK (T) LTD.....1ST RESPONDENT
LILIAN SOPHIA KIMARO.....2ND RESPONDENT

Date of Last Order: 05/07/2022
Date of Ruling: 12/08/2022

RULING

NANGELA, J:.

This application was brought to the attention of this Court under a certificate of urgency. It was filed by way of a chamber summons supported by an affidavit of the Applicant. The chamber summons was preferred under Rule 2(2) and (3) of the High Court (Commercial Division) Procedure Rules, GN. No.250 of 2012 (as amended by GN. No. 107 of 2019), and Order I Rule 10(2) of the Civil Procedure Code, Cap.33 [R.E 2019].

The Applicant is seeking for the following orders of the Court:

1. That, this Honourable Court be pleased to order that the Applicant be joined as a necessary party to the Commercial Case No.126 of 2021 and her name be included in that suit as a Defendant, to enable the

Court effectually and completely adjudicate upon and settle all questions involved in the Commercial Case No.126 of 2021.

2. Any other order the Court may deem fit to grant.

In terms of representation, Mr Dickson Tugara, learned advocate appeared for the Applicant and Mr Waziri Mchome, learned advocate appeared for the 1st Respondent. The 2nd Respondent enjoyed the legal services of Ms Rita Chikoma and Joyce Maswe. When the matter was called on for orders on the 5th of July 2022, this Court directed the parties to have it disposed of by way of written submissions. A schedule of filing was issued and the parties duly complied with it. I will summarize their respective submissions before I deliberate on the merits of this application and issue my verdict of it.

In his submission in support of the application, Mr Yohana Ayall (who filed the Applicant's submissions) recited the rules and the Order under which the application is premised and submitted that, the Applicant's presence in the proceedings pending before this Court is necessary if this Court is to effectually and completely adjudicate upon and settle all questions involved in the main suit. He contended that, the Applicant has, under oath, stated that she has interest in Plot No.484, L.O. No.149163, CT. No.56973, Phase II Mikocheni Area, in Dar-es-Salaam, which forms the subject matter of the main suit.

According to Mr Ayall, the main question involved in the aforementioned property is about the legality of its disposition, first as a transfer from the Applicant's deceased husband to the 1st

Respondent and secondly to the 2nd Respondent from the first Respondent. He contended that, the Applicant's contention is that the transfer of the suit property to the 1st Respondent was executed illegally it being a matrimonial property and, hence, its subsequent transfer to the 2nd Respondent was as well unjustified because the 1st Respondent had no better title when she transferred it to the 2nd Respondent. He also pointed out that, the agreement to mortgage the property was done before the 1st Respondent had obtained the title from the Applicant's Deceased husband.

It was Mr Ayall's further submission that, in the main suit, what the 1st Respondent is seeking is for orders of sale of the property registered as Plot No.484, L.O. No.149163, CT. No.56973, Phase 11 Mikocheni Area, in Dar-es-Salaam. As such, he contends that, since the Applicant has expressed interest in it and alleges that the dispositions giving rise to the declarations claimed therein arose from a nullity, this claim needs a proper channel to be addressed and the Applicant be given opportunity to be heard.

To support his submissions, Mr Ayall has referred to this Court the Court of Appeal decision in the case of **21st Century Food and Packaging Ltd vs. Tanzania Sugar Producers Association & 2 Others**, Civil Appeal No.91 of 2003, (unreported). With such support of his submission, he has urged this Court to grant the prayers.

For his part, Mr Waziri Mchome, learned advocate for the 1st Respondent, summed up the Applicant's rationale for seeking to be joined as a party in the pending suit, as being premised on two grounds: (i) that, the consent of the Applicant was not sought when

the late Thomas Sifuel Kimaro transferred the suit property in Commercial Case No.126 of 2021 to the 1st Respondent and, (ii), that, the Applicant has interest in the suit property forming the subject of Commercial Case No.126 of 2021.

Traversing on the two grounds upon which the Applicant's arguments are premised, Mr Mchome submitted, in the first place, that, the counter affidavit filed in Court by the 1st Respondent had facts which were uncontroverted by the Applicant since no affidavit in reply to the counter affidavit was filed and, if filed, the same was not served on the 1st Respondent.

According to Mr Mchome, the uncontroverted facts in the counter affidavit are those disclosed in paragraphs 6, 10, 12 and 13 of the counter affidavit. He contended that, it was averred that consent of the Applicant was not required in the course of effecting the transfer to the Second Respondent because the said property was not in the joint names of the late Thomas Sifuel Kimaro. He contended further that, the Applicant is not even alleging that, there were joint efforts of the Applicant and the late Thomas Sifuel Kimaro in acquiring and developing the said property.

For that matter, he contended that, the subsequent mortgage of the said property to the 1st Respondent did not also require consent of the Applicant as, at the time of mortgaging the said property to the 1st Respondent, the same was in the 2nd Respondent's name.

Mr Mchome submitted further that, the law is clear regarding the effect of not controverting statements made under oath by another statement made under oath. To back up his submission on

that point, Mr Mchome relied on the decision of this Court in the case of **East African Cables (T) Ltd vs. Spencon Services Limited**, Misc. Commercial Case No. 42 of 2016 (unreported).

Mr Mchome further relied on the case of **John Sylvester Ngtse and Others vs. Anna Lori Sulle**, Civil Appeal No.181 of 2020 (unreported) and contended that, one cannot use submissions to controvert the evidence made on oath because submissions are not evidence. Mr Mchome was of the view that, the Applicant's submissions did not address specifically anything stated in the counter affidavit as if the affidavit was uncontroverted.

As regards the contention that the Applicant has interest in the suit property in Commercial Case No.126 of 2021, it was Mr Mchome's submission that, paragraph 13 of the counter-affidavit by the 1st Respondent did make it clear that, the Applicant does not have interest which entitles her to be made a party to the Commercial case No.126 of 2021 because, the property was transferred by its registered owner, the late Thomas Sifuel Kimaro.

Mr Mchome has argued further that, what the Applicant is asking from this Court is for her to be sued by the Plaintiff while the law is clear that, the Plaintiff being the master of his own cause, has the liberty to choose whom to sue. He supported that point by referring to this Court the case of **CMA CGM (T) Limited vs. Insignia Limited**, Misc. Commercial Appl. No. 168 of 2016 (unreported).

Mr Mchome submitted further, and referring to the averments in paragraph 13 of the counter affidavit, that, in this pending matter, the Applicant does not have direct or legal interest in the property,

even if it was a matrimonial home because, the *administratrix* of the estate of the late Thomas Sifuel Kimaro having filed in Court, back in 8th February 2017, documents indicating how she distributed the estate of the late Thomas Sifuel Kimaro, she ceased to be an *administratrix* of the estate and cannot have interest or suffer any irreparable loss if the prayer to be joined is not granted.

He submitted that, the reason for such a view is based on the fact alleged by the Applicant that, the house in question, is one of the properties she distributed to other persons she mentioned in paragraph 7 of the supporting affidavit, and, assuming that the properties were distributed to heirs, including the suit property, the Applicant does not remain with any direct or legal interest in the property she distributed.

He added that, if one is to contend that she is still the administratrix of the estate of the late Thomas Sifuel Kimaro, still she will not have the leverage of defending the suit because her power as the *administratrix* of the estate of the late Thomas Sifuel Kimaro, is limited to the cause of actions which survived the estate of the late Thomas Sifuel Kimaro, and, that, the Commercial Case No.126 of 2021 is not one of them.

To support his contention, reliance was placed on the decision of the Land Court in the case of **Marwa Haruni Chacha vs. North Mara Gold Mine Limited**, Land Case No.8 of 2013 (unreported). Mr Mchome submitted further that, even if the Applicant was the *administratrix* of the estate of the late Thomas Sifuel Kimaro, she cannot complain that her consent was not sought or obtained because,

upon being appointed an *administratrix* of the estate of the late Thomas Sifuel Kimaro, she stepped into the shoes of the late Thomas Sifuel Kimaro.

For that matter, he argued that, it is as if Thomas Sifuel Kimaro is complaining against himself for what he did. To butress that point, he relied on the case of **Maria Ernest Biginagwe (widow) and Marwa Haruni Chacha (Probate Administrator of Estate of the Deceased Ernest Baginagwe)**, Land Case No. 52 of 2017 (unreported).

Mr Mchome submitted that, the current application is only intended to delay the determination of the suit and give the 2nd Respondent more time of remaining with the loan amount advanced to her, noting that, even in her defence the 2nd Defendant disputes the claims without stating whether she has repaid the loan or not. He, consequently, urged this Court to dismiss this application with costs.

Let me point out from the outset of my deliberations that, in this application, the Applicant did not file rejoinder submission. In view of that, I will, therefore, proceed to consider the rival submissions by the parties as I respond to the issue whether or not this Court should grant the prayers sought by the Applicant.

It is also worth noting, as correctly pointed out by Mr Mchome, that, the Applicant did not file any reply to the counter-affidavit. That is a fact whose implication is that, whatever the 1st Respondent stated in her counter affidavit which the Applicant ought to have controverted, will remain as an uncontroverted fact. In essence, such a failure to controvert averments in the counter-affidavit which ought to have

been controverted, cannot be cured by way of submissions. It is a cardinal rule that evidence given under oath should to be countered by evidence under oath as well. This was basically what this Court, and also the Court of Appeal stated in the cases of **East African Cables (supra)** and **Gilbert Zebedayo Mrema vs. Mohammed Issa Makongoro, Civil Application No.369/17 of 2019, (CAT)(DSM) (unreported).**

In the case of **East African Cables (supra),** the Respondent's Counter Affidavit had simply countered an averment in the Applicant's affidavit which had indicates that the Respondent was about to wind up its business, by putting the Applicant to strict proof of what was asserted without further ado. The Court's response was to the effect that:

> "In law affidavit and/or counter affidavit (as the case may be) is evidence. It is a voluntary declaration of the facts written down and/or sworn by the declarant before an officer authorised to administer oaths. Unlike pleadings (plaint and written statement of defence and other pleadings), affidavits/counter affidavits are prima facie evidence of the facts stated therein. **When a fact is stated on oath, it has to be controverted on oath and this gives the Court an opportunity to weigh which fact is probably true than the**

> **other**. When the facts sworn to or affirmed are not controverted then it is deemed to be admitted. When a person swears or makes a sworn declaration of a fact, the best way to challenge him/her is to swear a fact which tends to show that what he sworn was false. Putting him to strict proof of the fact without giving your side of the story which you want to be believed, amounts to an admission of the fact. A requirement of strict proof of the facts applies to pleadings in the suit (i.e. Plaint, written statement of defence, reply etc.) and not to affidavit and counter affidavit which are as said earlier, evidence." **(Emphasis added).**

In a similar tone, the Court of Appeal in the Case of **Gilbert Zebedayo, (supra))**, citing its other decision in the case of **Mandavin Company Limited vs General Tyre (E.A) Ltd, Civil Application No.47 of 1998 (unreported),** had the following to say, and I quote:

> "We declined to entertain an application for review after being satisfied that the applicant failed to contradict by affidavit, the deposition made by the respondent. We said:

> *"We agree with Mr. Ngalo, that, affidavitial deposition is evidence on oath* ***which cannot be contradicted by statements from the bar. Such evidence like any other type of evidence given under oath can only be controverted on oath.*** *In the instant case, apart from the statements from the bar by Mr. Lugua, learned advocate, denying service, there was no evidence to contradict the respondent's evidence."* **(Emphasis added).**

From the above cases, the position of the law is therefore clear in that regard. One cannot controvert evidence made under oath by other means other than by producing under oath facts which seek to controvert such other evidence and, where such earlier facts are by way of affidavit, then they must be countered or negated by in the same way, that is to say, by way of an affidavit in reply.

In his submission, however, Mr Mchome was specific that, the uncontroverted facts in the counter affidavit are those disclosed in paragraphs 6, 10, 12 and 13 of the counter affidavit. To me, by merely pointing out those paragraphs, he means that the rest, i.e., paragraphs 7, 8, 9 and 11 needed not to be controverted. That being said, and, if the rest of paragraphs needed not be controverted, does it mean that this Court is not, considering the averments in both affidavits when taken together, afforded with an opportunity to weigh which of the remaining fact is probably true than the other? I do think it is.

That being the case, I am of the considered view, there is a necessity to consider the applicant's application on merits and that necessity stems from the need to ensure that the pending matters in this Court are effectually and completely adjudicated upon and all questions involved in the main suit are settled. Essentially, the application, having been brought under Rule 2 (2) of the High Court (Commercial Division) Rules and Order I rule 10 (2) of the Civil Procedure, it does signify that the Applicant intends that this Court should effectually and completely adjudicate upon and settle, once and for all, questions involved in the main suit.

In that spirit, and taking into account that, this is a matter of granting a party right to be heard, which right is fundamental, interest of justice would demand that, the Applicant be afforded such opportunity to be heard and the merits of her submissions be considered. With such considerations, I find that, the case of **21st Century Food and Packaging Ltd vs. Tanzania Sugar Producers Association & 2 Others**, Civil Appeal No.91 of 2003, (unreported) which was cited by the learned counsel for the Applicant, has relevance to this application. In that case, the Court had the following to say:

> "in that situation, we think it would be in the interest of justice that the appellant is given an opportunity of being heard in order to enable the Court to settle the issues raised in the suit. To do so, we also think, that, not only would this [be in] accord with the spirit of the provisions of Rule 10 (2) of Order I of the Civil Procedure Code but would also

> be in conformity with the principle of natural justice, i.e., according an opportunity to a party to be heard in a matter which directly affects the party."

In his submission, Mr Mchome contended that, the Applicant does not have a direct interest in the property involved. I do not think I need to delve on such a matter at this preliminary stage. He has also stated that the Plaintiff cannot be forced to sue a person whom s/he is not interested to sue. That is indeed a correct view and I am in agreement with the authority cited by Mr Mchome.

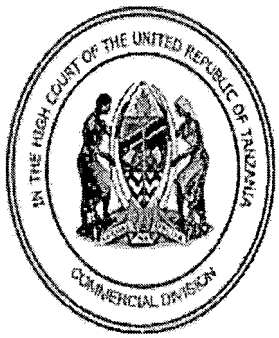
However, I am of the view, and taking the circumstances of this matter and the pending suit into account, that, even if it is in the Plaintiff's prerogative to elect whom to sue and not to, where there is a necessity for a party to be joined in a suit, the Court is not precluded from making such order if it thinks that, joining such a party will assist in ensuring effectual and complete adjudication and settlement of all questions involved in a particular suit. That reasoning alone is, in my view, paramount since it is in the interest of justice that litigations are brought to an end effectively. In view of that, I see no need not traverse any further into the jungle of submissions made by the parties.

It should suffice to state that, as look at the affidavit of the Applicant, I find that there is a necessity to grant the applicant's prayer to be joined in the main case and doing so will assist this Court to effectually and completely adjudicate upon and settle, once and for all, questions involved in the main suit. In view of that, I settle for the following orders:

1. That, in the interest of justice, the application is hereby granted. The Applicant, thus, will be added to the suit as 2nd Defendant to the suit.
2. That, since the Applicant did not pray for costs, the granting of this application goes with no order as to costs.

It is so ordered.

DATED at DAR ES SALAAM ON THIS 12TH DAY OF AUGUST, 2022



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DEO JOHN NANGELA
JUDGE

Ruling delivered in the presence of Ms Ngolo Balele, learned Advocate for the Applicant, Ms Rita Chikoma, learned Advocate for the 2nd Respondent and Mr Mohamend Zameen Nazarali, learned Advocate for the 1st Respondent.

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DEO JOHN NANGELA
JUDGE
12.08.2022